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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FREDDIE FRANK MITCHELL,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

1.

Whether Ga. Code Ann. § 26-2910 (1968), a criminal statute defining reckless conduct, is so vague and indefinite that any penalty prescribed for its violation constitutes a denial of due process as required by the due process clause of the Fourteenth Amendment.

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PART ONE

STATEMENT OF THE CASE

Geraldine Gaston Mitchell, the Petitioner's common law wife died on or about

May 9, 1979 as a result of a gunshot wound. (T. 20, 105, 106, 141). The Petitioner, Freddie Frank Mitchell, was subsequently arrested and charged with involuntary manslaughter. (T. 86, 142). The indictment charged Petitioner with involuntary manslaughter and provided in pertinent part that Petitioner: . . ."did unlawfully and without any intention to do so, kill Geraldine Gaston Mitchell, a human being, while accused was engaged in the commission of the following unlawful act, in that accused, having possession of a pistol, did endanger the bodily safety of said Geraldine Gaston Mitchell who was present by consciously disregarding a substantial and unjustifiable risk that his act would cause harm and endanger the safety of the said Geraldine Gaston Mitchell, the disregard constituting a gross deviation

from the standard of care which a reasonable person would exercise in said situation, did allow said pistol to point in the direction of the said Geraldine Gaston Mitchell, and while so pointing did pull the trigger on said pistol, causing it to fire and shoot the said Geraldine Gaston Mitchell; thereby killing the said Geraldine Gaston Mitchell." The Petitioner was convicted and sentenced to five years imprisonment on July 25, 1979.

The Petitioner appealed his conviction to the Supreme Court of Georgia on four alleged enumerations of error by the trial court. One of these enumerations of error was a challenge to Ga. Code Ann. § 26-2910 on vagueness grounds. The Supreme Court of Georgia transferred the case to the Georgia Court of Appeals. The Georgia Court of Appeals

rejected the challenge to the reckless conduct statute relying on the case of Horowitz v. State, 243 Ga. 411 (1979) and affirmed the Petitioner's conviction on April 9, 1980. A Motion for Rehearing was denied on April 24, 1980. The Petitioner then applied for a Writ of Certiorari to the Supreme Court of Georgia. This application was denied on June 11, 1980. Motion for Reconsideration was filed and denied on June 24, 1980.

Further facts will be developed as necessary for a more thorough consideration of the issues raised by the present petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. GA. CODE ANN. § 26-2910 IS NOT SO VAGUE AND INDEFINITE THAT THE PENALTY FOR ITS VIOLATION CONSTITUTES A DENIAL OF DUE PROCESS AS REQUIRED BY THE FOURTEENTH AMENDMENT.

In the instant petition, the Petitioner alleges in substance that Ga. Code Ann. § 26-2910 is allegedly so vague and indefinite that it violates the due process clause of the Fourteenth Amendment of the United States Constitution. The Respondent would submit that the test by which this statute should be judged is laid down in the case of United States v. Harriss, 347 U.S. 612, 617 (1953). In Harriss, this Court stated that

"The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." It is clear that if this standard is applied to the present statute, the statute is sufficiently definite to protect the person of ordinary intelligence.

Further, the Petitioner's complaints would appear to apply to the proscription of reckless conduct per se. However, criminal culpability for recklessness has long been a part of American law. Indeed, Ga. Code Ann. § 26-2910 is substantially similar to §§ 2.02(2)(c) and 211.2 of the Proposed Official Draft of the Model

Penal Code of May 4, 1962. (See Appendix).

As such, recklessness is a proper mode for the imposition of criminal culpability in instances where a jury has been properly instructed by the trial court. (See Henderson v. Kibbe, 431 U.S. 145 (1977). Therefore, it is apparent that Ga. Code Ann. § 26-2910 does not deprive the Petitioner of due process of law under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For all of the above and foregoing reasons, the Respondent respectfully requests this Court deny the Petition for a Writ of Certiorari filed on behalf of the Petitioner, Freddie Frank Mitchell.

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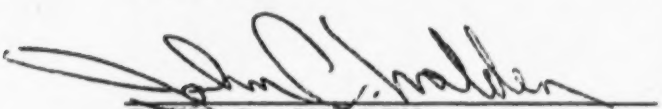

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CERTIFICATE OF SERVICE

I, John C. Walden, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three (3) copies of same in the United States Mail with proper address and adequate postage to:

Mr. Edward D. Tolley
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This 23rd day of October, 1980.

/s/
JOHN C. WALDEN

Section 2.02. General Requirements of Culpability.

(1) Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(2) Kinds of Culpability Defined.

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

(3) Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element

is established if a person acts purposely, knowingly or recklessly with respect thereto.

(4) Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

(5) Substitutes for Negligence, Recklessness and Knowledge. When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

(6) Requirement of Purpose Satisfied if Purpose Is Conditional. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

(7) Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

(8) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

(9) Culpability as to Illegality of Conduct. Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.

(10) Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

Section 211.2. Recklessly Endangering Another Person.

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.